

1983 Ky. Op. Atty. Gen. 2-434, Ky. OAG 83-356, 1983 WL 166122 (Ky.A.G.)

*1 Office of the Attorney General
Commonwealth of Kentucky

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September 1, 1983

Mr. John P. Farrelly
Chief of Police
411 West Lincoln Trail
Radcliff, Kentucky 40160

Dear Chief Farrelly:

Mr. Tommy Ocheltree has appealed the denial of inspection of records concerning his brother, Robert Ocheltree, by the Radcliff City Police Department to this office pursuant to [KRS 61.880](#). Mr. Ocheltree requested in writing the following:

- "1. Any and all arrest warrants and their supporting affidavits;
- "2. Any and all police radio dispatch tapes and records in regards to the aforementioned case;
- "3. Any and all medical reports, doctors' statements, and hospital records in regards to the aforementioned case;
- "4. Any and all handwritten statements, and oral and taped statements reduced to typed or written ones, made by Robert Ocheltree, Raymon Greigo, Cecilia Silva, Mary Ann Vittitow, Beulah Greigo, Dr. Robert E. Robbins, and any and all other witnesses and persons having information and interviewed by the police in regards to the aforementioned case;
- "5. Any and all investigative reports, and summaries thereof, prepared by any and all detectives, police officers, or other personnel of your Department that pertains to, in any shape, form or fashion, the aforementioned case; and
- "6. Any and all other records pertaining to the aforementioned arrest, investigation and conviction of Robert Ocheltree in the 1st degree assault of Raymon Greigo."

Mr. Ocheltree stated in his request letter that a conviction and final disposition was made regarding his brother on June 22, 1982, in the Hardin Circuit Court on Indictment No. 81-CR-72 and that an appeal has been taken.

OPINION OF THE ATTORNEY GENERAL

The records requested appear to be public records but are not yet available for public inspection, and therefore denial of access at this time, for the reasons set out below, was proper.

The denial based on [KRS 61.878\(1\)\(f\)](#) and OAG 76-424 by the Radcliff City Police Department, after review by the commonwealth attorney, was by reason that the prosecution of the case was not yet complete due to appellate actions. We agree with this position. Since an appeal has been taken of your brother's conviction in the circuit court, we do not believe that conviction is final or complete until it has been upheld by the last appellate court to which the conviction is taken. See [Cornett v. Jud. Retirement and Removal Com'n](#), 625 S.W.2d 564 (1982). Cf. regarding a civil investigative matter on appeal discussed in OAG 83-41. This position is also consistent with the language found in [KRS 17.150\(2\)](#) regarding reports by law enforcement officers. Only when the prosecution is completed or no prosecution is going to be made would the documents covered by [KRS 17.150](#) be accessible to the public if not still permissibly withheld pursuant to [KRS 17.150\(2\) \(a\)-\(d\)](#). If a criminal case is on appeal, the possibility exists of a remand for a new trial and for this reason the prosecution is not completed.

*2 It is also to be noted that the documents requested relate to a criminal investigation and prosecution and are, as to the accused, subject to discovery, if at all, under Kentucky Criminal Rules of Procedure. [RCr 7.24](#) and [7.26](#). We do not believe the general public's right of access to documents and information concerning criminal action can be greater than the right of access to the same documents by the accused himself. To the extent the Open Records Act, [KRS 61.870](#), et seq. or [KRS 17.150](#) would be deemed to be in conflict with the Kentucky Criminal Rules, the rules must prevail. See [Trent v. Com.](#), Ky.App., 606 S.W.2d 386, 387 (1980). This conclusion is compelled by [KRS 447.154](#) which reads as follows:

“No act creating, repealing, or modifying any statute shall be construed directly, or by implication, to limit the right of the Court of Justice to promulgate rules from time to time or to supersede, modify or amend any rule so promulgated. Nor shall any statute be construed to limit in any manner the power of the Court of Justice to make rules governing practice and procedure in the courts.”

In summary, it is the opinion of the Office of the Attorney General that reports and documents involving a criminal prosecution are subject to discovery by the accused pursuant to Kentucky's Criminal Rules of Procedure and will be available to the public, unless otherwise properly exempted, once an appealed criminal conviction has been affirmed by the court of last resort to which the conviction is taken.

As directed by statute a copy of this opinion is being sent to the requestor who has the right to challenge it in court.

Sincerely,
Steven L. Beshear
Attorney General

By: Robert L. Chenoweth
Assistant Deputy Attorney General and Chief Counsel

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